United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-2098-2104

ORIGINAL

To be argued by
MARK D. LEFKOWITZ

(42309)

United States Court of Appeals

FOR THE SECOND CIRCUIT

Nos. 75-2098 and 75-2104

JAMES RHEM, ROBERT FREELY, LEO ROBINSON, and EUGENE NIXON, individually and on behalf of all other persons similarly situated.
Plaintiffs-Appellees,

v.

BENJAMIN J. MALCOLM, Commissioner of Correction for the City of New York, ARTHUR RUBIN, Warden, Manhattan House of Detention for Men, ABRAHAM D. BEAME, Mayor, City of New York,
Defendants-Appellants,

PETER PREISER, Commissioner of Correction of the State of New York, HUGH CAREY, Governor of the State of New York, and OWEN McGIVERN, Presiding Justice, New York State Supreme Court, Appellate Division, First Department, individually and in their official capacities,
Defendants.

JAMES BENJAMIN, MIGUEL GALINDEZ, BRUCE HAYES, JOSE SALDANA and ROBERT ESCHERT, detainees of the New York City House of Detention for Men, individually and on behalf of all other persons similarly situated.
Plaintiffs-Appellees,

v.

BENJAMIN J. MALCOLM, Commissioner of Correction of the City of New York, ARTHUR RUBIN, Warden, New York City House of Detention for Men, GERARD BROWN, Deputy Warden, New York City House of Detention for Men, and ABRAHAM D. BEAME, Mayor of the City of New York, individually and in their official capacities,
Defendants-Appellants.

APPELLANTS' BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes:

United States Court of Appeals

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APPELLANTS' BRIEF

Preliminary Statement

This is a consolidated appeal from an amended judgment of the United States District Court for the Southern District of New York (LASKER, J.), entered on April 23, 1975, which enjoined appellants from confining detainees of the plaintiff class at the New York City House of Detention for Men at Rikers Island (hereinafter "HDM") unless certain conditions detailed in the judgment were met, and from an order entered July 11, 1975 granting a preliminary injunction enjoining appellants from confining any pre-trial detainee at HDM unless such confinement was under those conditions provided in the amended judgment of April 23, 1975. Judge LASKER granted appellants a stay of the implementation of the preliminary injunction until oral argument before this Court.

The *Rhem* action, commenced in 1970, is a class action brought pursuant to 42 U.S.C. § 1983 and 28 U.S.C. § 2201. It challenged the constitutionality of conditions under which persons were held in pre-trial custody by the City of New York at the Manhattan House of Detention, commonly referred to as the Tombs. The District Court ruled in its opinion of January 7, 1974, that certain conditions and practices at the Tombs violated the Constitution and directed the City to submit a comprehensive plan within thirty days to eliminate these conditions and practices. The City did not submit a plan to the Court because of the inordinate cost of such a project. The District Court on July 11, 1974 enjoined confinement at the Tombs after August 10, 1974. This order was appealed to this Court, which affirmed Judge LASKER's findings of unconstitutionality but remanded for a new remedy. Reported below: 371 F. Supp. 594 (S.D.N.Y., 1974); affd. in part, remanded in part, 507 F. 2d 333 (2d Cir., 1974).

After this Court's decision in November, 1974, the City decided to close the Tombs. The detainees confined at the

Tombs were then transferred to HDM. Judge LASKER, after remand from this Court, assumed jurisdiction over the Tombs transferees at Rikers Island. He thereafter conducted a relief hearing pursuant to this Court's remand, wherein he explored the differences between the Tombs and HDM in order to frame appropriate relief. It was based upon this relief hearing that he enjoined the municipal defendants (hereinafter "the City") from confining members of the plaintiff class (now very few in number) at HDM unless certain conditions and practices were established.

The *Benjamin* lawsuit, brought pursuant to 42 U.S.C. § 1983 and 28 U.S.C. § 2201, challenges the conditions and practices of pre-trial confinement at HDM. The class there consists of all pre-trial detainees at HDM. Judge LASKER granted preliminary injunctive relief to the plaintiffs identical to the final relief he ordered in the *Rhem* proceeding. The injunctive relief was based upon the hearings held on remand in *Rhem*.

Appellants moved to consolidate the appeals in *Rhem* and *Benjamin* because of the identity of the issues and the fact that both decisions were based upon the same record. This motion was granted on August 4, 1975 (VAN GRAAFEILAND, C.J.).

Issues Presented

On this appeal the City challenges but two of the items of relief ordered by the District Court, namely, its direction that all visits at HDM should be "contact visits" and its direction that, on an experimental basis, additional optional lock-in periods should be afforded to inmates over and above the optional lock-in periods already provided to inmates at HDM.

With respect to contact visits, we would note that the deprivation of such visits was held by the District Court

in the Tombs case to constitute an unconstitutional deprivation, a finding which was affirmed by this Court on the earlier *Rhem* appeal, and which the City is prepared to accept as proper insofar as HDM is concerned. What the City does here challenge is the proposition, apparently accepted by the District Court, that, because an absolute deprivation of such visits is unconstitutional, all visits to inmates at this facility must be contact visits (except for identified security risks), this, without regard to the period of time for which an inmate has been incarcerated, and, apparently, without regard for the fact that providing that all visits shall be contact visits can be accomplished only at great cost. Related to this point, we also urge here that the District Court did not hold a sufficient hearing before ordering this relief.

With respect to the Court's ordering additional optional lock-in periods, it is our position that the record before the District Court was insufficient to support its conclusion that this relief was constitutionally required.

Facts

(1)

One week after this Court filed its opinion in the first *Rhem* appeal, the Commissioner of Correction advised Judge LASKER that the City had decided to close the Tombs rather than remedy the unconstitutional conditions.* The remaining 350 to 400 inmates were to be transferred to HDM (15a).** The remaining plaintiff class claimed that apart from those matters having to do with the physical structure of the Tombs, they were still entitled to relief

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* The Tombs was closed to pre-trial confinement on December 20, 1974.

** Unless otherwise indicated, number in parentheses refer to pages of the Joint Appendix.

while confined at HDM (15a). The relief sought included (1) the establishment of a classification system; (2) the limitation of time when locked into one's cell ("lock-in"); (3) an optional lock-out program (choice as to whether to be locked in or locked out of one's cell during a lock-out period); (4) adequate physical recreation; (5) contact visits and other visiting conditions; (6) changes in disciplinary procedures; and (7) liberalization of correspondence regulations (17a).

The City initially pressed for a full trial with an opportunity for discovery (198a-200a). Basically, it argued that HDM was not the same institution, in many ways, as the Tombs, and before challenges of unconstitutionality of conditions and practices could be resolved, a discovery of those conditions and practices at the new institution should be had.

Judge LASKER disagreed for several reasons. First, he asserted that what was involved were constitutional rights, irrespective of the institution. Second, the relief hearing was to be conducted to determine the differences between the Tombs and HDM. Third, Judge LASKER noted that this Court's affirmance in the original *Rhem* proceeding included a direction to the District Court not to conduct a new trial (4-6).

Much of the testimony at the relief hearing dealt with visiting procedures and recreation at HDM. Since recreation as administered at HDM is not in issue here, the following account of the testimony relates specifically to visiting procedures and optional lock-in.

Francis R. Buono, Supervising Warden at Rikers Island, described visiting procedures on the island. He testified that the general visitation program at Rikers Island encompasses four institutions, as well as the Rikers Island Hospital (16-18). The warden stated that at the present time the "visiting house" is shared by HDM and the Adolescent Detention Center (19). He described the various

procedures and check-points which a visitor must go through before visiting an inmate (23-24).

Warden Buono explained some of the problems that occur during visiting hours. He stated (42):

> "Well, we do have the exposure to people attempting to bring in concealed weapons; you have a narcotics problem there; you have the fact that many of them will come along with not only whiskey bottles on their person, but being openly held in their hands. You have large numbers coming to visit the person knowing that only one individual can visit. We have to try to control that problem. There is the searching of vehicles that has to be contended with; the fact that there is also a possibility of any kind of a mass assault on the area. You read enough of the newspapers to know a great many things can happen. So these men are exposed to quite a number of problems in terms of security."

Warden Buono testified on cross-examination that detainees generally require tighter security than sentenced inmates. He stated that the number of escape attempts, assaults, and "unusual occurrences are so much greater in proportion with the detention inmate" than the sentenced inmate (100-102).

James A. Thomas, Warden of the New York City House of Detention for Men, testified that inmates are locked out of their cells between 9 and 11 in the morning, 1 to 3 in the afternoon, and approximately 6 to 9:30 in the evening (119). In addition, inmates are locked out of their cells during their three meals, each meal taking approximately one-half hour (119-120).

Warden Thomas also explained that the inmates must be locked in their cells during various periods of the day in order to accomplish cell sanitation and head counts

(121-122, 124, 127). He stated, however, that during the evening lock-out period from 6:00 to 9:30, inmates have the option to remain in their cells during this period. In addition, optional lock-in is afforded to inmates from 8 a.m. to 4 p.m. on Saturdays, Sundays and holidays (135-136).

Warden Thomas then explained to the Court why additional optional lock-in could not be afforded to the inmates at HDM. He stated that the institution must always be ready to send an inmate to court or to bring him to the visiting area and that, in view of the numerous activities scheduled by the institution during lock-out hours, it would be an administrative burden to locate certain individuals who have opted to remain in their cells (135-136). Warden Thomas stated (136):

> "Now we have got the trouble not only of calling his name and getting him out from the immediate environs where he may be but we have to maybe go up to the tier in the back of the cellblock to get him. This is not a—I am not trying to say that this is something that is very prevalent, but in addition to that, just take the visit. If we had optional lock in and the guys locked in the cell, it is going to take even longer to get the man out for his visit, because one must go up on the tier, unlock the cell, and let him out of the cell. We have no way of knowing ahead of time just who is going to get visits."

See also testimony at pages 387-394.

The Warden was then asked if the implementation of a classification system to determine security risks would allow for a "change of the lockout schedule". Warden Thomas replied that classification had nothing to do with the inability to provide optional lock-in. Rather, the problem was a logistical one, relating to the number of programs at the institution and the size of the detention pop-

ulation (136-137). In addition, the physical size of HDM (a large "lateral" institution) presents a problem of moving inmates from their housing areas to the various programs and services in the institution (137).

Warden Thomas also testified concerning the visiting procedures at HDM. He noted that there are numerous delays involved in the visiting procedure, including locating an inmate, searching clothing which has been brought for an inmate by a visitor, depositing money brought for an inmate by a visitor, as well as searching a visitor (144-150).

On subsequent re-direct examination, Warden Thomas was again questioned by the Court concerning the feasibility of an optional lock-in program. Judge LASKER stated that if such a program was implemented, inmates who elected to remain in their cells during a lock-out period would waive their right to participate in any other activity. Warden Thomas then explained the difficulty involved in such a program (414):

> "Now you get some of them [inmates] that they want this particular privilege. I have no great feeling about not granting it to them. But there is going to be difficulties about it. There is going to be arguments that 'I didn't want to lock-in.' You follow me? And 'You should have locked me out,' and all of these things are going to come up. And this was why, we, at the time, this was why I made the arbitrary ruling that they would be out during the program times."

(2)

At a post-hearing conference held on March 23, 1975, Judge LASKER discussed the factors to be weighed in determining appropriate visiting schedules. He observed that, the "physical facts relating to the facility, its location, its structure and so forth, are factors which it is reasonable to take into consideration in determining what is

proper constitutionally as to visiting schedules" (440). Moreover, he noted, it must also be determined if "the institution has a capacity, both physical and financial, to do better than what otherwise [would] be a minimum" in terms of constitutional standards.

District Court Judgments

The *Rhem* Judgments

(1)

In its first memorandum and judgment, filed on February 20, 1975, the District Court held with respect to the following conditions and practices:

Classification—a classification system at HDM is no less needed there than it was at the Tombs. A limitation of the right to a contact visit can be justified under a classification system which can segregate security risks (20a-21a).

Lock-In Time—lock-in periods are governed to a large extent by the time spent in conducting head counts and sanitation. Judge LASKER recognized that there is "evidence that the duration of head counts and cleaning periods might be shortened". However, he concluded that it "would be inappropriate for the court to define a specific duration for either activity" (22a).

Optional Lock-In—although the administration at HDM does permit limited optional lock-in periods (each day, from the end of the evening meals, approximately 6:30 p.m. to 9:30 p.m., and 8:00 a.m. to 4:00 p.m. on Saturdays and Sundays), the Court saw no reason why additional optional lock-in periods could not be made available to detainees, at least on an experimental basis. The Court noted that whatever problems arose as a result of optional lock-in during activity periods could be obviated by having an inmate choose to remain in his cell at the beginning of the activity period and thus "waive his right to attend an ac-

tivity for that period, or to remain in the public parts of the cell block" (22a-25a).

Contact Visits—contact visits, as ordered at the Tombs, should be established at HDM. The City had agreed, the Court noted, to establish a program for contact visits (26a).

Visiting Schedule—the City has expanded its visiting schedule to provide that a detainee is entitled to one visit either at night on Monday through Friday or during the day on Saturday or Sunday each week. The Court rejected plaintiffs' request for a more expanded visitation schedule, recognizing (1) that the total population of Rikers Island is 6,000, including 1,500 detainees at HDM, housed in five institutions, and (2) that the Island is "relatively inaccessible". The Court stated (28a):

> "It must be remembered that we are here dealing with constitutional rights which set minimal, not maximum or 'desirable' standards. The constitutional norm ought to be a reasonable number of opportunities for visits of reasonable duration."

Recreation—the City was ordered to provide weekday use of the recreation yards during the winter period (October-May) (30a-32a).

Other Requested Relief—plaintiffs also sought (1) the right to continue to meet counsel and receive personal visits in New York County; (2) free daily access to telephones; (3) overnight housing in New York County for inmates who are to consult with their attorneys or to appear in court the following day. The Court determined that such relief was plainly beyond its power to grant "if for no other reason that the subject matter has never formed a part of this suit" (25a-26a).

The judgment of February 20, 1975, insofar as it related to the two areas of contention here, namely optional lock-in and contact visits provided the following (34a-38a):

Optional Lock-In—within 60 days of the entry of the Court's judgment, the City was directed to commence a program of optional lock-in during activity periods in two cell blocks chosen by the Warden at HDM. Inmates in the designated cell blocks would have the option to remain locked in their cells during activity periods. It was further provided that if at the end of thirty days the Warden determined that it was "not practical or feasible to extend such optional lock-in to all the members of the plaintiff class, he shall report to the court in writing his reasons for such a conclusion, furnishing a copy of such report to the attorneys for the plaintiffs." After plaintiffs' counsel responded to this determination, the Court would then rule "whether the program of expanded optional lock-in shall be eliminated, further tested or applied to all members of the class within the institution." Unless the Warden reported his determination within the time provided, all members of the plaintiff class were entitled to and would receive such expanded optional lock-in (36a).

Contact Visits—within 90 days of the entry of the judgment, all personal visits accorded plaintiffs are to be contact visits. Under an established classification system, contact visits could be denied to certain detainees if institutional security would be jeopardized. However, application first had to be made to the Court before a contact visit was denied (37a).

(2)

Plaintiffs moved to "amend and correct" the judgment of February 20, 1975, "with regard to the issues of numbers of visitors per visit, visiting schedules and recreation" (39a-43a).

Appellants also moved to "amend, correct and stay" the February 20th judgment (44a). They sought to amend the Court's judgment as it related to expanded lock-out hours, optional lock-in, contact visits and visitation in general (45a-55a).

In his affidavit in support of the City's motion Commissioner Malcolm discussed the problems related to an optional lock-in program. He stated that although the Court determined that those inmates who elected to be locked in during an activity period would waive their right to participate in activities during that period, such a procedure "fails to take into account the nature and scope of the programs offered by HDM" (52a). Commissioner Malcolm explained that the various programs at the institution had waiting lists of inmates and that when an inmate was able to fill a vacant slot in a particular program, he would be resentful if his waiver during a lock-out period caused him to lose his turn (52a). Commissioner Malcolm stated that vacancies in such programs occur at "sporadic and irregular intervals" (52a). He concluded that the optional lock-in program now in existence should not be expanded and should be administered solely by the authorities at HDM (52a).

Judge LASKER amended the February 20th judgment. With respect to the two issues with which we are concerned here, optional lock-in and contact visits, the Court amended the February 20th judgment by (1) providing that the Commissioner of Corrections had the option to implement the experiment in all cell blocks at HDM, and (2) striking the requirement that the appellants would have to apply to the court for permission to deny contact visits to detainees who were selected under a classification system. In all other respects, regarding these two issues, the Court adhered to the February 20th judgment (78a-83a).

(3)

Plaintiffs moved to re-open the relief hearing in an attempt to present affirmative testimony on many of the issues which had been explored (84a-118a). The Court denied this motion, stating that the issues which the plaintiffs have raised "should be litigated in a plenary lawsuit"

(123a-124a). The Court stated (124a):

> "As we have earlier stated, this case has been prosecuted only by a plaintiff class of persons who have inmates at the Manhattan House of Detention (Tombs) at the time the suit was instituted. No decision in the litigation has ever had the effect or been intended to have the effect of adjudicating the rights of any persons at the House of Detention for Men except members of the plaintiff class in the instant lawsuit. Accordingly, our denial of the motion as a matter of law is without prejudice to the commencement of any litigation on behalf of those detainees at HDM who are not members of the plaintiff class in the present case."

The *Benjamin* Preliminary Injunction

By order to show cause, the *Benjamin* plaintiffs moved for a pleliminary injunction requesting, *inter alia,* the following relief: one hour of outdoor exercise each weekday; a minimum of four 30 minute visits weekly, at least one of which shall be at night or on a weekend; contact visits; and the option of remaining in the cell during all lock-out periods (495-526).

In his affidavit in opposition, Commissioner Malcolm stated that the Department was complying with the amended judgment in the *Rhem* case. He stated that with respect to the two issues raised herein that (1) "Contact visits will be afforded to appropriate class members in conformity with the judgment of the Court", and (2) remaining *Rhem* class detainees (then 30-40 out of approximately 1600 detainees) were placed "into one housing block" and were permitted to enter and leave their cells during all lock-out periods. The Commissioner then stated that the Department was making every effort to apply the *Rhem* judgment to all of HDM (579-580). He said that the Department "is presently in the process of constructing

for use by [non-*Rhem* class] members a contact visitation facility". As to optional lock-in, the Commissioner repeated those reasons advanced in *Rhem* why administratively he was opposed to such a program (580-581).

The Court, in granting the preliminary injunction directed, *inter alia*, that commencing July 23, 1975, the appellants were to "forthwith take all practical steps necessary to provide facilities for contact visits to all class members, and all personal visits to class members shall be contact visits as soon as such facilities have been provided". Appellants could deny contact visits to select detainees who are security risks justified under a classification system (585). The optional lock-in experiment provided in the amended *Rhem* judgment was similarly established for the *Benjamin* class (585-586).

The Court, in its memorandum of July 11, 1975 stated that, despite the appellants' objection that granting the preliminary injunction would constitute final relief, cited the likelihood of the plaintiffs' success on the merits in the instant litigation and the Court's familiarity with the institution and issues based upon the *Rhem* relief hearing (596-600).

Judge Lasker granted appellants a stay of the preliminary injunction until oral argument before this Court (588-589).

POINT I

The District Court erred in ordering appellants to provide contact visits for all detainees at HDM without having a full hearing on the physical and financial problems associated with such an order.

(1)

As stated earlier, we do not challenge the proposition that the total denial of contact visits to all pre-trial detainees violates the Constitution. We respectfully urge, however, that the remedy here imposed by the District Court to rectify such violation of the detainees' constitutional rights was all out of proportion to what was constitutionally required and, further, was decided upon on an insufficient record.

In both the *Rhem* case and in *Detainees of the Brooklyn House of Detention for Men* v. *Malcolm* (decided July 31, 1975), this Court affirmed as to the unconstitutionality of the conditions and practices in issue, but remanded for a new remedy. In *Rhem,* this Court took cognizance of the City's financial crisis, although it asserted that the District Court must "decide the case before it, whatever sympathy it may have for those who must manage a great metropolis beset by grievous problems" 507 F. 2d at p. 342.

Judge BARTELS, writing for the Court in *Detainees of the Brooklyn House of Detention,* concluded (slip opinion at p. 5291):

> "this proceeding should be remanded to the district court to consider a proper remedy equitable to both the City and the detainees, keeping in mind the financial crisis facing the City and the practical considerations necessary to prevent the detainees from being transferred to distant facilities."

It is thus clear that the problems of the City in administering its jails, at least in terms of its ability to finance

restructuring of conditions and the implementation of constitutionally required practices, are significant considerations that must be reckoned with before appropriate equitable relief can be granted by a District Court. We respectfully submit that the District Court failed to adequately explore these considerations when it issued the preliminary injunction in the *Benjamin* case.*

At the outset of the relief hearing in *Rhem* the Court stated that the purpose of the hearing was to determine the factual differences between the Tombs and HDM (4-6). In its memorandum decision of June 26, 1975, Judge LASKER flatly asserted that "No decision in this litigation has ever had the effect or been intended to have the effect of adjudicating the rights of any persons at the House of Detention for Men *except members of the plaintiff class in the instant suit* [*Rhem*]" (emphasis supplied).

During the conference of March 23, 1975, after the relief hearing in *Rhem,* Judge LASKER had discussed "the question of what constitutes constitutionally adequate visiting schedules" (440). He stated that "the physical facts related to the facility, its location, its structure and so forth," are factors which should be taken into consideration (440). Judge LASKER also recognized that the institution's "physical and financial capacity" should also be considered prior to any judgment (441).

Thus, the Court after first recognizing that the relief hearing in *Rhem* was directed solely to the differences between HDM and the Tombs, and after recognizing that the particular physical and financial capacities of each institu-

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* Since the remaining members of the *Rhem* class are so few in number the Department is able to comply with the amended judgment of April 23, 1975 without significant administrative difficulty. However, the arguments made here with respect to the relief accorded the *Benjamin* plaintiffs are fully applicable to the *Rhem* plaintiffs. The City should not be required to treat these two groups of inmates housed at the same facility any differently.

tion must be analyzed, nonetheless ordered appellants to provide contact visits at HDM virtually for all inmates and for all visits. We emphasize that this was done without affording the City an opportunity to present all available statistics regarding its capability for implementing contact visits on an institution-wide basis.

In fact, on August 28, 1975, the New York City Board of Estimate and the City Council did approve the lump sum capital budget schedule for the Department of Corrections which includes an allotment of $200,000 for the construction of facilities for contact visits at HDM. Commissioner Malcolm had stated in his affidavit in opposition to the plaintiffs' motion for a preliminary injunction that a contact visiting program for non-*Rhem* class members was under consideration (580).

Clearly, the City is willing to provide contact visits to these inmates to the extent that it is financially able to do so—and we recognize the power of the courts to order us to do so. However, as both of this Court's earlier opinions in *Rhem* and *Detainees of the Brooklyn House of Detention* indicate, the task of the Court in fashioning appropriate equitable relief in cases such as this is to most carefully consider not only the inmate interests that are involved but also the municipal fiscal resources available. In the case at bar the District Court simply did not have before it the full picture of what providing this relief would cost. Similarly, there is no indication that the District Court gave any consideration to any alternative relief short of providing that all visits should be contact visits (except for classified security risks).

We are fully prepared to here accept the proposition that a total deprivation of contact visits to a pre-trial detainee who has been confined for a substantial period of time may not be defended as constitutional. However, it does not at all follow that it is unconstitutional not to provide such visits to short term detainees or that, even

for the long term detainee, every visit should be a contact visit. Clearly, having all visits contact visits imposes a substantial burden on this institution, and, we submit, the ordering of this drastic relief went beyond what was constitutionally required and was done on an insufficient record.

Under these circumstances, we submit, this matter should be remanded to the District Court for further consideration of the appropriate relief to be accorded plaintiffs.

POINT II

The District Court's determination that appellants must implement an experimental optional lock-in program was error. It represents unwarranted affirmative interference with the administration of HDM.

(1)

At the *Rhem* relief hearing, Warden Thomas testified concerning the difficulties of implementing a more expanded optional lock-in program. Essentially, these problems involved locating individuals who elected to remain locked in their cells. During a lock-out period, an inmate may be called to court or receive a visitor. He would have to be located and brought to the appropriate area. This would require additional manpower that would be available to go through the cell blocks to locate an inmate while other correction officers must be present at the various activities in the institution.

More significant than the lack of manpower to accomplish this is the fact that if an inmate has elected to lock-in during an activity period, and his turn to fill a particular vacancy in an institutional program "comes up," he will lose that opportunity because he has waived his right to participate in any activity during that particular lock-out

period. The resentment which can develop from such a denial certainly would tend to exacerbate an already tense environment.

Warden Thomas also testified concerning the difficulty of taking a man from his cell to comply with an unpopular order (*e.g.*, reporting to the medical facility for a determination as to his fitness for transfer to the Ossining Correctional Institution) during the time that the inmate had elected to remain locked in (391). In addition, orders requiring a court appearance at sporadic irregular intervals would foster continuous one to one confrontations between inmates and officers.

Viewing the fact that optional lock-in is permitted for all but four hours of lock-out time during the weekdays, a more expanded program, even on an experimental basis that would require additional manpower and interfere with the present administration of HDM, is unreasonable and an inappropriate exercise of the Court's power. Although Judge LASKER stated during the *Rhem* relief hearing, that he did not wish to administer HDM, his order that an experimental optional lock-in program be implemented at HDM cannot be interpreted in any other way than an unwarranted administrative interference in the institution, unjustified by any convincing evidence that the existing practice at the institution is shocking or dehumanizing.

CONCLUSION

The amended judgment and the order here appealed from should both be reversed to the extent that they order additional optional lock-in. With respect to contact visits the matter should be remanded to the District Court for a hearing to determine an appropriate remedy.

September 8, 1975.

Respectfully submitted,

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L. Kevin Sheridan,
Mark D. Lefkowitz
Donald J. Tobias,
of Counsel.

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

Mark D. Lefkowitz

being duly sworn, says that on the 5th day of September 1975

at No. Fed Cthouse Foley Sq. in the Borough of Manhattan in New York City, he served a ~~copy~~ proof

of the annexed brief upon Joel Berger Esq.,

the Attorney for the Appellees in the within entitled action, by delivering

a copy of the same to a person in charge of said Attorney's office, and leaving the same with him.

Sworn to before me, this 5

day of Sept. 1975

MIRIAM MULBERRY
Commissioner of Deeds
City of New York - No. 3-1669
Commission Expires July 1, 1977

Mark D. Lefkowitz

Form 3-332-1210-7(61)

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

BRUCE GARNER

being duly sworn, says that on the 9 day of Sept. 1975

at No. 12 Cark Row in the Borough of Manh. in New York City, he served ~~a copy~~ of the

of the annexed Appts - Brief upon The Legal Aid Society Esq.,

the Attorney for the Pltf - Appls in the within entitled action, by delivering

a copy of the same to a person in charge of said Attorney's office and leaving the same with him.

Sworn to before me, this 9

day of Sept. 1975

MIRIAM MULBERRY
Commissioner of Deeds
City of New York - No. 3-1669
Commission Expires July 1, 1977

Bruce Garner

Form 3-332-1210-7(61) — 116